United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7466

NO. 76-7466

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IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

Marriott In-Flite Services, A Division of

MARRIOTT CORPORATION,

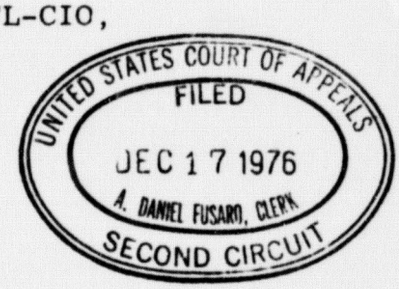
Appellant

v.

LOCAL 504, AIR TRANSPORT DIVISION,

TRANSPORT WORKERS OF AMERICA, AFL-CIO,

Appellee



JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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(CAPTION OMITTED)

COMPLAINT

Plaintiff, MARRIOTT IN-FLITE SERVICES, A DIVISION OF MARRIOTT CORPORATION, by its attorneys, Jackson, Lewis, Schnitzler & Krupman, complaining of the Defendant, LOCAL 504, AIR TRANSPORT DIVISION, TRANSPORT WORKERS OF AMERICA, AFL-CIO, respectfully alleges as follows:

JURISDICTION

1. This action arises under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §§151, et seq. (hereinafter "the Act"), an Act of Congress regulating commerce, and the pendent jurisdiction of this Court. This Court has jurisdiction under section 303 of the Act, 29 U.S.C. §187, and its said pendent jurisdiction.

AS AND FOR A FIRST CAUSE OF ACTION

2. Plaintiff is and at all times hereinafter mentioned was a corporation duly organized, created and existing under the laws of the State of Delaware, having its principal office at 5161 River Road, Washington, D.C., and duly authorized to do business in the State of New York, having an office and place of business at Building 139, John F. Kennedy International Airport, County of Queens, City and State of New York.

3. Plaintiff operates a food catering service that provides in-flight meals for commercial airlines operating from terminals

located in the New York metropolitan area. Plaintiff maintains food production facilities at various locations in the County of Queens, to serve these airlines.

4. Plaintiff, in the course and conduct of its business, causes, and has continuously caused at all times material herein, large quantities of foodstuffs, food preparation equipment, vehicles, other equipment and materials used by it in its business, to be purchased and transported in interstate commerce from and through various States other than the State of New York, and causes, and continuously has caused at all times herein mentioned, substantial quantities of prepared foods to be sold to and transported by commercial airlines engaged in interstate commerce.

5. Plaintiff is, and was at all times material herein, a "person" and "employer" within the meaning of Sections 2(1) and (2) of the Act, 29 U.S.C. §§152(1) and (2).

6. Upon information and belief, Defendant, Local 504, Air Transport Division, Transport Workers of America, AFL-CIO, is, and was at all times material herein, an unincorporated labor association whose principal offices are located at 153-33 Rockaway Boulevard, Jamaica, County of Queens, City and State of New York.

7. Defendant Local 504 is, and was at all times material herein, a "person" and "labor organization" within the meaning of Sections 2(2) and (5) of the Act, 29 U.S.C. §§152(2) and (5).

8. Upon information and belief, K.L.M. Royal Dutch Airlines (United States Organization) (hereinafter "K.L.M."), is, and was at all times material herein, a foreign corporation, organized and existing under and by virtue of the laws of the Kingdom of the Netherlands, duly authorized to do business in the State of New York, and engaged, inter alia, in the air transportation of passengers and cargo to and from John F. Kennedy International Airport.

9. Upon information and belief, K.L.M. does, and at all times material herein did, operate in interstate commerce and is, and was at all times material herein, a "person" within the meaning of Section 2(1) of the Labor Management Relations Act, as amended, 29 U.S.C. §152(1).

10. Upon information and belief, prior to July 1, 1973, K.L.M. maintained its own food service catering operation in a leased building at the intersection of 145th Drive and 167th Avenue in Queens County, City and State of New York, which prepared food for service on its flight originating at, or continuing from, John F. Kennedy International Airport.

11. Upon information and belief, certain employees at said facility were members of, and represented by, Defendant Local 504, and the terms and conditions of their employment were governed by a collective bargaining agreement between Defendant Local 504 and K.L.M.

12. Upon information and belief, said collective bargaining agreement expired on or about October 31, 1972, and since that date,

and at all times material herein, a labor dispute has existed between Defendant Local 504, and K.L.M.

13. Officers, agents, members, representatives and employees of Defendant Local 504 and/or others acting in concert with them, are not now, and at all times material herein, were not employees of Plaintiff.

14. At no time material herein has Defendant Local 504 had any labor dispute with Plaintiff, its suppliers or contractors.

15. Upon information and belief, on or about July 1, 1973, Defendant Local 504, by its officers, agents, members, representatives, employees and/or others acting in concert with it, struck K.L.M. and began to picket at the above-mentioned facility, which strike and picketing continued throughout the period of K.L.M.'s occupancy of the premises.

16. By agreement effective July 1, 1973, K.L.M. contracted with Plaintiff to provide food services for K.L.M.'s flights from John F. Kennedy International Airport. These services have been provided, at all material times herein, from Plaintiff's own, existing facilities.

17. By assignment effective July 15, 1973, Plaintiff acquired from K.L.M. the latter's leasehold interest in the premises described in paragraph 10.

18. Since on or about July 15, 1973 and continuing through on or about August 31, 1973, Defendant Local 504, by its officers, agents, members, representatives, employees and/or others acting in concert with it, continuously picketed the said premises leased by Plaintiff, and:

a. Damaged Plaintiff's premises by throwing rocks through each and every window in said building, said windows numbering approximately fifty, and otherwise;

b. Damaged Plaintiff's vehicles by splashing and puncturing the tires on said vehicles and throwing rocks and other objects against the sides and through the windows of said vehicles;

c. Threatened, assaulted, interfered with, and intimidated Plaintiff's employees, and persons doing business with Plaintiff;

d. Interfered with, impeded, obstructed and blocked Plaintiff's rightful ingress to and egress from, and use of, said premises;

e. Threatened, requested, appealed to, and ordered employees of Plaintiff and others doing business with Plaintiff, not to enter upon the premises of Plaintiff, and obstructed them from doing so.

19. By the acts and conduct set forth in paragraph 18, and by other means, the Defendant has (i) induced and encouraged individuals employed by Plaintiff, and other persons engaged in commerce, or in industries affecting commerce, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or to perform services, and (ii) has threatened, coerced, and restrained Plaintiff and other persons engaged in commerce or in industries affecting commerce, where in both cases an object thereof was and has been, to force and require:

a. Plaintiff to cease doing business with K.L.M.; and,

b. Other persons engaged in commerce, or in industries affecting commerce, to cease doing business with Plaintiff, so as to force or require Plaintiff to cease doing business with K.L.M.

20. Defendant, by the acts and conduct alleged in paragraphs 18 and 19 above, has engaged in unlawful acts and conduct within the meaning of Sections 2(6) and (7), 8(b)(4)(i)(B) and (ii)(B), and 303(a) of the Act, 29 U.S.C. §§152(6) and (7), 158(b)(4)(i)(B) and (ii)(B) and 187(a).

21. By reason of the said unlawful acts and conduct of Defendant Local 504, by its officers, agents, representatives, employees, members and/or others acting in concert with it, Plaintiff has been unable to use the above described facility for normal business purposes, and has been damaged in its business and property within the meaning of Section 303(b) of the Act, 29 U.S.C. §187(b).

22. Plaintiff has suffered a loss of business and profits and has otherwise been damaged in its business and property, as a result of Defendant's unlawful acts and conduct, all in the sum of one hundred thousand dollars ($100,000.00).

AS AND FOR A SECOND CAUSE OF ACTION

23. Plaintiff repeats and realleges all of the allegation contained in paragraphs 1 through 18 of this Complaint with the same force and effect as if herein set forth.

24. The tortious and trespassory conduct complained of in paragraph 18 was committed by Defendant, its officers, agents, employees, representatives, members and others acting in concert

with them, wilfully, wantonly, intentionally, maliciously, and without just cause or excuse.

25. By reason of said acts and conduct, Plaintiff has been compelled to make repairs to its damaged property and employ persons to maintain and protect its property and employees, and the property, persons, and employees of others having business with Plaintiff, at the premises described in paragraph 10.

26. By reason of the acts and conduct set forth in paragraph 18, Plaintiff's property has been damaged and destroyed; it has been wrongfully deprived of the economic benefit of its leasehold interest in the above-described facility, and it has been put to unnecessary effort and expense to repair, maintain and preserve its property and to protect its employees and the employees and property of others doing business with Plaintiff and has been wrongfully deprived of the full economic benefit of its agreement with K.L.M. and has otherwise suffered tortious interference with its business, all in the sum of fifty thousand dollars ($50,000.00).

AS AND FOR A THIRD CAUSE OF ACTION

27. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 18 of this Complaint, with the same force and effect as if herein set forth.

28. Plaintiff entered into the agreement and assignment described in paragraphs 16 and 17 in order to obtain an additional customer for its in-flight food catering service (K.L.M.) and additional facilities for its normal business operations, namely, the building mentioned in paragraph 10.

29. Upon information and belief, Defendant, its officers, agents, employees, representatives, members and others acting in concert with them, had knowledge of the said agreement and assignment at all times material herein.

30. Nothwithstanding this knowledge, Defendant, its officers, agents, employees, representatives, members, and others acting in concert with them, wrongfully, knowingly, intentionally, maliciously, and without just cause or excuse, engaged in the acts and conduct described in paragraph 18 with the sole purpose of enticing, inducing, pursuading and compelling Plaintiff to violate, repudiate and refuse to further proceed under its agreement with K.L.M., or failing in that objective, to damage Plaintiff in its property and business for continuing to deal with K.L.M.

31. By reason of the acts and conduct set forth in paragraph 30, Plaintiff's property and business relationships with K.L.M. and others have been injured, damaged and destroyed, all in the sum of one hundred thousand dollars ($100,000.00).

WHEREFORE, Plaintiff demands judgment against Defendant on this Complaint in the sum of two hundred fifty thousand dollars ($250,000.00) for actual damages incurred to date, and one hundred

thousand dollars ($100,000.00) as punitive damages for Defendant's wilful, wanton and malicious acts and conduct, with interest, from the dates of accrual of these causes of action, together with costs, disbursements and reasonable attorneys fees, and for such other and further relief as the Court may deem proper.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
11 West 42nd Street
New York, New York 10036
Telephone: (212) 947-2000

BY: _____
MARTIN F. PAYSON

IVAN H. RICH, JR., ESQ.
Marriott Corporation
5161 River Road
Washington, D.C. 20016

ATTORNEYS FOR PLAINTIFF

DATED: New York, New York
September 13, 1973

(CAPTION OMITTED)

ANSWER

Defendant, by its attorney, WALLACE, O'HAIRE and WALLACE, for its answer to the Complaint herein:

1. Denies the allegations of paragraph 1, except admits that plaintiff purports that jurisdiction is predicated upon 29 U.S.C. 151 et seq. and 29 U.S.C. 187.

AS TO THE FIRST CAUSE OF ACTION:

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs marked "2", "3", "4", "5", "8", "16" and "17" of the plaintiff's Complaint herein.

3. Denies each and every allegation contained in paragraphs marked "18 (a) (b) (c) (d) (e)", "19 (a) (b)", "20", "21" and "22" of the plaintiff's Complaint herein.

4. Admits the allegations contained in paragraphs marked "6", "7", "13", "14" of the plaintiff's Complaint herein.

5. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph marked "9" of the Complaint except admits that the plaintiff purports that K.L.M. is and was a "person" within the meaning of Section 2 (1) of the Labor Management Relations Act, as amended, 29 U.S.C. 152 (1).

6. Admits the allegations contained in paragraph marked "10" except denies any knowledge or information suificient to form a belief as to whether or not the building was leased by K.L.M.

7. Admits so much of paragraph marked "11" as alleges that "certain employees at said facility were members of and represented by Defendant Local 504" but denies that "the terms and conditions of their employment were governed by a collective bargaining agreement between Defendant Local 504 and K.L.M.". An agreement did exist between K.L.M. and the Transport Workers Union of America, AFL/CIO.

8. Denies the allegations in paragraph marked "12" of the plaintiff's Complaint, except admits that the collective bargaining agreement between K.L.M. and the Transport Workers Union of America, AFL/CIO provided for an expiration date of October 31, 1972 and that a labor dispute existed betweeen them.

9. Denies the allegations contained in paragraph marked "15" of the plaintiff's Complaint except admits that some members of Local 504 picketed the facility operated by K.L.M.

AS TO THE SECOND CAUSE OF ACTION:

10. Repeats, reiterates and realleges each and every answer to the plaintiff's first cause of action with the same force and effect as if the same were herein set forth at length.

11. Denies each and every allegation contained in paragraphs marked "24" and "26" of the plaintiff's Complaint.

12. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph marked "25" of the Complaint.

AS TO THE THIRD CAUSE OF ACTION:

13. Repeats, reiterates and realleges each and every answer to the plaintiff's first cause of action with the same force and effect as if the same were herein set forth at length.

14. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph marked "28" of the Complaint.

15. Denies each and every allegation contained in paragraphs marked "29" and "30" of the Complaint.

WHEREFORE, defendant demands judgment dismissing the Complaint, together with costs and disbursements.

Andrew J. Wallace

WALLACE, O'HAIRE and WALLACE

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Jericho, New York 11753
(516) 938-7500

TO: JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys for Plaintiff
11 West 42 Street
New York, New York 10036

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

MARRIOTT IN-FLITE SERVICES, A DIVISION OF MARRIOTT CORPORATION,

Plaintiff,

- against -

LOCAL 504, AIR TRANSPORT DIVISION, TRANSPORT WORKERS OF AMERICA, AFL-CIO,

Defendant.

- x

DOCKET NO. 73 C 1300

MEMORANDUM AND ORDER

In this action for damages arising out of secondary picketing activities, defendant Union moves for summary judgment.

THE FACTS

KLM Royal Dutch Airlines, not a party to this action, operated a commissary at John F. Kennedy International Airport, from which it supplied food for its own flights leaving JFK. KLM's employees in the commissary were members of defendant union, which together with its international (Transport Workers of America) were the recognized bargaining agents for those employees.

During renegotiations for several bargaining agreements which were due to expire on October 31, 1972, KLM announ-

ced its intention to close the commissary operation permanently. The union's opposition to this decision created a stumbling block to renegotiation of further contracts between KLM and the union. As a result, the union membership authorized a strike on October 27, 1972.

During the subsequent six month "cooling-off" period invoked by the National Mediation Board pursuant to the Railway Labor Act, 45 U.S.C. §151 et seq. (which applies not only to railroads but also to air carriers such as KLM) both sides remained adamant in their positions on the prospective closing of the commissary. At the end of the "cooling-off" period in June, 1973, KLM permanently closed down the commissary and terminated its employees who had worked there.

In late June, 1973, KLM contracted with plaintiff Marriott for the latter to provide the food service for KLM's flights out of JFK. At the same time KLM assigned to Marriott its leasehold interest in the commissary building effective July 15, 1973. In effect, KLM thus shifted its food service from its own employees to an independent contractor.

In response to the commissary closing and employee termination, all members of Local 504 who were KLM employees struck on July 1, 1973. The commissary facility and other KLM buildings were picketed for a two month period, during which alleged acts of damage and destruction occurred to the commissary. It is these acts, claimed by Marriott to have been done by defendant union as part of secondary picketing proscribed by statute, which give rise to the instant suit.

On September 7, 1973, the strike ended and the union members returned to work. KLM offered substitute positions to all of its former commissary employees. Some of them accepted the offer and were relocated; others pursued arbitration procedures against KLM to remedy their situation.

THE ACTION

Marriott brought this action, alleging that during the strike the union had violated the secondary picketing provisions of the Labor Management Relations Act (LMRA).[1.] The means claimed to have been used by the union were both direct acts against Marriott and attempts to coerce others to cease doing business with Marriott. Marriott also claims

1. 29 U.S.C. §§ 151, 158(b)(4)(i) and 158(b)(4)(ii)(B), and §187(a).

3

compensatory and punitive damages for the union's alleged destruction of Marriott's property, for tortious interference with Marriott's business and contractual rights, and from Marriott's resulting loss of business and profits.

THE MOTION

The union has moved for summary judgment on two grounds. It claims first, that this court lacks subject matter jurisdiction over the defendant because the latter is exempt from the provisions of the LMRA, being covered instead by the Railway Labor Act (RLA).[2./] Second, the union argues that even if the LMRA applies to it, the activities in which the union engaged were on the admitted facts not prohibited by law because Marriott was not a "neutral" in the union's dispute with its employer, KLM.

DISCUSSION

The threshold issue, which is dispositive here, is whether the court has jurisdiction to entertain this action under 29 U.S.C. §158(b)(4), which prohibits certain activities such as secondary picketing by "a labor organization or its agents". The key question is: can the defendant union be

2. 45 U.S.C. §§ 151 et seq.

considered a "labor organization" as that term is defined in the LMRA? As appears below, this jurisdictional question must be answered in the negative, and the complaint must be dismissed.

The LMRA, under which plaintiff seeks relief, defines a "labor organization" in terms of its function as between "employees" and "employers". 29 U.S.C. §152(5).[3./] Since air carriers and their employees are subject to the RLA, 45 U.S.C. §§ 181, 182, employees of KLM are expressly excluded from the LMRA's definition of "employee". 29 U.S.C. §152(3).[4./]

3. 29 U.S.C. §152(5) provides in relevant part:

> "(5) the term 'labor organization' means any organization of any kind * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes * * * ." (emphasis supplied).

4. 29 U.S.C . §152(3) provides in relevant part:

> "(3) the term 'employee' shall include any employee * * * but shall not include * * * any individual employed by an employer subject to the Railway Labor Act * * *."

There is a parallel definition of employer which reads:

> "(2) the term 'employer' includes a person acting as an agent of an employer, directly or indirectly, but shall not include * * * any person subject to the Railway Labor Act * * *."

Thus, the LMRA clearly would exclude the defendant from the classification of a "labor organization" if the defendant's members are individuals "employed by an employer subject to the RLA".

In opposition to the foregoing, Marriott argues that a congressional amendment to the secondary activities restrictions of the LMRA has extended their application to include both employers and employees who are also subject to the RLA. Prior to 1959, the LMRA prohibited a "labor organization or its agents" from engaging in secondary activities designed to influence "employees of an employer".

> "It shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment * * *" 29 U.S.C. §158(b)(4) (emphasis supplied).

Because the LMRA defined employer and employee as excluding those who were subject to the RLA, this section meant, prior to 1959, that there was no prohibition of secondary activities when done either by an organization of RLA employees or against an RLA employer.

Then, in 1959, Congress amended the LMRA by changing "employees of an employer" to read "any individual employed

by any person". In practical effect this amendment expanded the class of persons protected by the act to include, among others, the previously exempt RLA employers and their employees. But there was no change in the statutory language which would include RLA employee unions in the classification of a "labor organization or its agents".

True, the legislative history of the 1959 amendment indicates a congressional intent that all parties subject to the RLA, both the acting employees and the passive employer, were now to be subject to the secondary activity restrictions of the LMRA:

> "Under the definition section of the Taft-Hartley Act railroad employees, agricultural workers and government employees are not employees within the meaning of the act. The Board [NLRB] has reached the conclusion that secondary boycotts by these exempt categories, and the inducement of such boycotts are not unfair labor practices. Secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else. The bill * * * would extend the ban to these excluded categories by use of the words 'any person' instead of the use of the words 'employees of any employer' in section [158(b)(4)]." 1959 U.S.C., Cong. and Admin. News 2318, 2384 (emphasis supplied).

However, the statutory change in language was inadequate to accomplish this asserted intention, since the

amendment left the statute's definition of a "labor organization" intact, using the old references to "employer" and "employee", which still excluded those who were subject to the RLA.

Thus, a plain reading of the statute indicates that while Congress extended the protections of §158(b)(4) to all employers, even those under the RLA, it made no concomitant extension of the prohibitions to encompass RLA employees.

In footnote 10 to Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 39 S.Ct. 1109 (1969) the Supreme Court similarly interpreted the statute:

> " * * * In 1959, [Section 158(b)(4)] was amended to expand the class of persons protected against secondary pressures * * *. However, the amendment did not expand the scope of 'employees' or 'labor organizations' whom the Act forbad to engage in such conduct." 394 U.S. at 377.

In another matter involving this same plaintiff the National Labor Relations Board concluded that an airline and its employees were subject to the ban on "hot cargo" agreements contained in the LMRA, 29 U.S.C. §158(e). As part of its decision, the Board stated that Congress had intended §158(b)(4) to apply to parties other than those who were

simply "employers" within the meaning of the LMRA; in short, the Board found that the airline employees there could be prohibited from engaging in secondary activities. International Association of Machinists and Aerospace Workers and Lufthansa German Airlines and Marriott In-Flite Services, 197 N.L.R.B. 232, 237-38 (1972).

On review, the Ninth Circuit noted that 88% of the union's members were "employees" within the meaning of §152(3) [i.e., they were not RLA employees], that more than 96% of the union's collective bargaining agreements were with non-RLA "employers", and that the challenged agreement itself was unrelated to RLA activities. On those facts, the Board had concluded, and the Ninth Circuit affirmed, that the union there was, indeed, a "labor organization" within the meaning of the LMRA.

In practical effect, the court held that when involved with a non-RLA activity, a union which had only 12% RLA employees and 4% RLA collective bargaining agreements had insufficient connection with the RLA to exclude it from the LMRA's definition of "labor organization". In the present case, however, the undisputed facts do not warrant a similar finding. Defendant asserts, without opposition, that

its total membership is 7,600, of whom only 1,000 are employed by non-RLA employers. Thus, approximately 86% of the defendant's membership are RLA employees, exactly the reverse of the situation in Marriott v. NLRB, supra. Moreover, the controversy giving rise to the contested activity here grew directly out of a dispute between KLM (an RLA employer) with its own employees, who are, therefore, RLA employees. Under these circumstances, it would be impossible to find, as did the Board in Marriott v. NLRB, supra, that the union here was a "labor organization within the meaning of the LMRA.

If the LMRA's restriction against secondary activities is to be extended to prohibit such actions by unions of RLA employees, further action by Congress would be required. But in the seven years since the Supreme Court highlighted the one-sidedness of the 1959 amendment in Brotherhood of Railroad Trainmen, supra, Congress has failed to take the necessary corrective action, a fact which argues strongly that Congress never intended such an extension.

In short, plaintiff may not maintain this action for damages under 29 U.S.C. 158(b)(4) against defendant union when 86% of its members are employees of RLA employers, and the primary labor dispute was with an RLA employer.

Accordingly, the action must be dismissed for lack of subject matter jurisdiction.

In view of the foregoing, it is unnecessary to consider the other arguments raised by the parties. Defendant's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed.

SO ORDERED.

Dated: Brooklyn, New York
August 19, 1976

GEORGE C. PRATT
U. S. DISTRICT JUDGE